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INDEX

for rehearing en banc was denied
and this petition for certiorari wa
of that date. This Court's jurisdic
28 U.S.C. § 1254(1).

QUESTIONS PRESE

1. Whether 33 U.S.C. § 905(b)
men's and Harbor Workers' Com
purports to relieve the shipown
damages for acts or omissions of th
the finder of fact to evaluate and a
age of fault of the concurrently
and reduce the plaintiff/longsh
against the shipowner accordingly
in general be referred to as the
proportional fault issue."]

2. Whether under the 1972 Amen
§ 905(b) which abrogated a longs
action based upon the warranty a
ness, the shipowner is liable for inj
of an independent contractor wh
sented at the place of work on the
vious and known to the stevedore
ees, an the ability to mitigate the

isory personnel to relay the warning or knowl-
the employees.

second and third questions will generally be
d to as the "care standard issues."]

STATUTORY PROVISIONS INVOLVED

ed States Code, Title 33 § 905(b):

'In the event of injury to a person covered un-
this Act caused by the negligence of a vessel,
n such person, or anyone otherwise entitled to
over damages by reason thereof, may bring an
ion against such vessel as a third party in ac-
dance with the provisions of section 33 of this
, and the employer shall not be liable to the
sel for such damages directly or indirectly and
agreements or warranties to the contrary shall
void. If such person was employed by the vessel
provide stevedoring services, no such action shall
permitted if the injury was caused by the negli-
ce of persons engaged in providing stevedoring
vices to the vessel. If such person was employed
the vessel to provide ship building or repair
vices, no such action shall be permitted if the in-
was caused by the negligence of persons en-
ed in providing shipbuilding or repair services
he vessel. The liability of the vessel under this-

> "The vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." H.R. Rep. No. 1441, 92d Cong., 2d Sess., [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4702-05.

On the standard of care issue, a direct conflict exists between the Fifth Circuit in *Samuels* and the Second Circuit in *Cox* v. *Flota Mercante Grancolombiana, S.A.*, 577 F.2d 798 (2d Cir. 1978), cert. denied by the United States Supreme Court in Case No. 78-72 on October 2, 1978.

Indicative of the conflict is that both of these circuits purport to follow Restatement (Second) of Torts §§ 342, 343 and 343A as setting the standards for determining what is shipowner negligence under 33 U.S.C. § 905(b). *Gay* v. *Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka Zvir*, 570 F.2d 449 (2d Cir. 1978). Yet these two Courts apply the standard with contradictory results.

In the Second Circuit *Cox* case, a vessel hatch beam could not be pinned or locked into place because of the

based law that a warning to
ment is sufficien

For instance in *Gulf Oil*
753 (5th Cir. 1960), cert. de
70, 5 L.Ed. 2d 61, rehearin
S.Ct. 231, 5 L.Ed. 2d 199 (U.

> "The owner or occup
> has a duty to warn the
> ent contractor who has
> the property, of dange
> inhere in that property,
> *charged if those in char*
> *dependent contractor a*
> *knowledge of the dang*
> *supervisors in employm*
> *son.*"

It should be noted that
Bivins was applying Restat
§ 342 as it also purported to

The landowner has the ri
tractor's supervisory person
knowledge about a dangerou

oard Air Line Railroad Co., 222 F.2d 57 (4th Cir. 955) Georgia law; *Brown* v. *American Cyanamid & hemical Corp.,* 372 F.Supp. 311 (S.D. Ga. 1973); *roley* v. *Matson Navigation Co.,* 313 F.Supp. 555 S.D. Ala. 1969), rev'd on other grounds, 434 F.2d 73 5th Cir. 1970)—Alabama law; *Kelley* v. *General Tele-hone Co. of the Southwest,* 498 F.2d 105 (5th Cir. 974)—Texas law; *Miles* v. *Shell Oil Co.,* 498 F.2d 105 5th Cir. 1974)—Texas law; *Hobart* v. *Sohio Petro-um Co.,* 255 F.Supp. 972 (N.D. Miss. 1966) aff'd 376 2d 1011 (5th Cir. 1967)—Mississippi law; *Storm* v. *ew York Telephone Co.,* 270 N.Y. 103, 200 N.E. 659 N.Y. 1936); *Schwartz* v. *General Electric Realty orp.,* 126 N.E. 2d 906 (Ohio 1955); *Hotel Operating* . v. *Saunders' Adm'r.,* 141 S.W. 2d 260 (Ky. 1940); *unt* v. *Laclede Gas Co.,* 406 S.W. 2d 33 (Mo. 1966); *race* v. *Henry Disston & Sons, Inc.,* 85 A.2d 118 Pa. 1952); *Crane* v. *I.T.E. Circuit Breaker Co.,* 278 2d 362 (Pa. 1971); *American Mut. Liability Ins. Co. Boston* v. *Chain Belt Co.,* 271 N.W. 828 (Wis. 1937); *akovich* v. *Peoples Gas Light and Coke Co.,* 195 N.E. 260 (Ill. App. 1963); *Pruett* v. *Precision Plumbing, c.,* 554 P.2d 655 (Ariz. App. 1976); *Citizen's Utility*

s Court Are in Apparent Conflict.

ıe law is unmistakeably toward
ility according to fault. This
loring Co. v. *Fritz Kopke, Inc.*,
74, 40 L.Ed. 2d 694 (U.S. 1974)
based upon comparative fault
not statutorily immune in non-
Inited States v. *Reliable Trans-*
5 S.Ct. 1708, 44 L.Ed. 2d (U.S.
damages to be allocated in di-
relative fault of the vessels in-

ion to date refusing to reduce
ıst third parties when the in-
r is concurrently negligent has
Haenn Ship Ceiling & Refitting
S.Ct. 277, 96 L.Ed. 318 (U.S.
ot, Inc. v. *Hawn*, 346 U.S. 406,
143 (U.S. 1953) and *Cooper*
z Kopke, Inc., 417 U.S. 106, 94
694 (U.S. 1974). See *Zapico* v.
.2d 714, 724-725 (2d Cir. 1978);
nd Co., Inc., 521 F.2d 756, 759-

Court's opinion in *Reliable Transfer* which advocated the allocation of "liability for damages according to comparative fault whenever possible." 421 U.S. at 411. While *Reliable Transfer* was decided two days before argument of the appeal in *Landon*, it was cited in neither that case nor in the subsequent appellate opinions in *Samuels*, *Shellman*, or *Dodge*. Judge Friendly cites *Reliable Transfer* in *Zapico*, 579 F.2d at 725, but only for a proposition totally unrelated to the apportionment of fault holding for which *Reliable Transfer* is best known.

The *Halcyon* and *Hawn* precedents are more than a quarter of a century old. In the interim there have been vast changes in the Longshoremen's and Harbor Workers' Compensation Act by virtue of the 1972 Amendments; the Supreme Court in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174 (1974) has specifically held that the doctrine of contribution applies in non-collision admiralty actions, thus emasculating the primary holding of *Halcyon*; and indemnity jurisprudence based on *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U.S. 124, 76 S.Ct. 232 (1956) and its warranty of workmanlike service was

or *Cooper Stevedoring* was the Court called upon to determine the validity of a credit defense such as that approved by the Fourth Circuit in *Edmonds*.

Regardless of the distinguishing features of these Supreme Court cases, each provides some guidance by analogy. Where, as here, the guidance is inconsistent, it is appropriate for this Court to step in and eliminate any discrepancies through a clear directive to the courts below. This is particularly true in this instance since "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime. . . ." *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. at 409.

3. The Conflict Involves Important Questions of Statutory Interpretation in What Congress Designated as Federal Law. The Decisions of the Courts of Appeal Are in Disarray and the Conflict Can Only Be Resolved by the Prompt Action of This Court.

Congress intended that legal questions arising in actions brought under the Longshoremen's and Harbor Workers' Compensation Act are to be determined as a matter of federal law.[1]

certainty and uniformity sought b
maritime community.

CONCLUSION

Petitioner respectfully urges t
granting the writ are significant: t
tions of the interpretation of the f
be reviewed and decided by this Co
ity will be restored to all maritime

Respectfully submi

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VILLAREAL AND BANKER, P.A.
Of Counsel

November 13, 1978

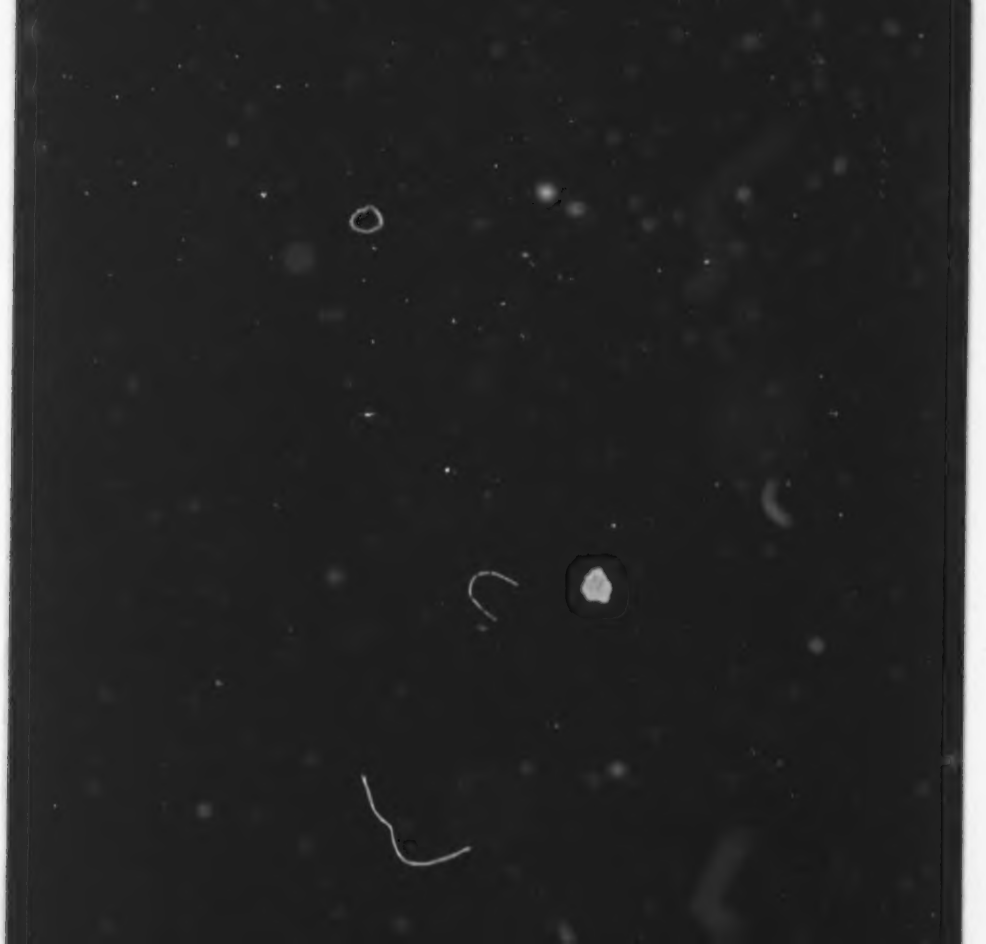
APPENDIX

beams abutted only three sides of the stanchion-ladder, there was a space behind the ladder as wide as the ladder, described variously by the witnesses as from 16 inches to 2½ feet in width. On April 13, 1973, at 9:30 p. m., the plaintiff slipped or stepped backwards into this void after getting a drink of water from a cooler.

There was evidence that the stevedore foreman and one or more of the other longshoremen knew of the hole; but there was evidence that the plaintiff himself did not know of it, and that it had never been called to his attenion. There was no dunnage over the cavity. The opening would have been open and obvious had the area been well lighted.

The ship was being unloaded at night. It had no fixed or permanent lights under the tween deck of the lower hold. Therefore, it was necessary to use drop lights arranged in a cluster beneath a reflector to provide sufficient illumination for the work to proceed. The lights were provided by the ship but placed by the stevedore's personnel. One was placed on each of the four corners of the hatch opening. This provided enough light to enable the men to work.

The degree of illumination, however, was not clearly established. Some witnesses testified that they could see the hole into which the plaintiff fell; another that it was obscure; one testified that the level of illumination was



against a vessel sued pursuan
after considerable discussion,
Fourth Circuit in *Edmonds v.*
atlantique, 4 Cir. 1977, 558 F
granted June 3, 1977, held tha
to be "confined to its own negli
utory fault on the part of the e
tiff's recovery should be redu
ployer's negligence. The plain
the compensation he has recei
recoup what he has paid from
subrogation provision of the L
Worker's Compensation Act, 3

The rationale for not reducin
ery because of his employer's
the Ninth Circuit's in *Dodge v.*
Tokyo, 9 Cir. 1975, 528 F.2d 669
944, 96 S.Ct. 1685, 48 L.Ed.2d 18
States Lines, Inc., 9 Cir. 1975,
1976, 425 U.S. 936, 96 S.Ct. 166
conclusion was reached (in dic
Landon v. Lief Hoegh & Co., 2
cert. denied sub nom., 1976, 42
L.Ed.2d 642.

Circuit allowed what has come to be known as the "Murray Credit" and allowed the tortfeasor in a common law tort action to claim a 50 precent credit if the compensation-covered plaintiff's employer were found to be contributorily negligent. *Murray* v. *United States,* 1968, 132 U.S.App.D.C. 91, 405 F.2d 1361. It later extended the same principle to an employee-plaintiff covered by the Longshoremen's and Harbor Workers' Compensation Act. *Dawson v. Contractors Transport Corp.,* 1972, 151 U.S.App.D.C. 401, 467 F.2d 727, pre-1972 amendment case.

In addition, a number of legal scholars have probed for solution. Robertson, Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments, etc., 976, 7 Journal of Maritime Law and Commerce, 447, 480, *seq.*; Cohen and Dougherty, The 1972 Amendments to the ongshoremen's and Harbor Workers' Compensation Act: n Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation, 1974, 19 N.Y.L. Forum 587; horter, In the Wake of the 1972 Amendments ot the L. & .W. C.A.: The Vessel's Rights Against the Stevedore, 976, 7 J. of Mar.L. & Com. 671; Steinberg, The 1972 mendments to the Longshoremen's and Harbor Workers' ompensation Act: Negligence Actions by Longshoremen gainst Shipowners—A Proposed Solution, 1976, 37 Ohio t.L.J. 767; Coleman and Daly, Equitable Credit: Appor-

ssions would merely further prolif-
We adhere to the logic of the Ninth

conclusion, we start with the pre-
the employer is immune to suit for
on by the vessel. 33 U.S.C. § 905;
stern Transmission Corp., 5 Cir.
. denied sub nom., 1976, 423 U.S.
Ed.2d 638; *Aetna Casualty & Surety*
ng, Inc., 5 Cir. 1973, 490 F.2d 299.
o the Longshoremen's and Harbor
Act evidence no intention of over-
Haenn Ship Ceiling & Refitting
72 S.Ct. 277, 96 L.Ed. 318. *Cooper*
Fritz Kopke, Inc., 1974, 417 U.S.
Ct. 2174, 2178, 40 L.Ed.2d 694.

gressional aims in 1972 were two-
nseaworthiness action but leave in
tion with promotion of shipboard
s; (2) eliminate any form or ves-
ttempt to shift liability (in whole
indirectly) to the stevedore. *See*
ar.L. & Com. at 484-85. Permitting
ne these aims by effectuating with-
of a shipowner contribution action

Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, and the longshoreman's compensation benefits were increased and the geographic area of coverage expanded. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 1977, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320. It is not apparent that the vessel owner was saddled with a disproportionate burden under the scheme. The plaintiff's recovery is still reduced proportionately to his own fault, *Pope and Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143; *see Edmonds, supra*, 558 F.2d at 189; *Dodge, supra*, 528 F.2d at 673; *Landon, supra*, 521 F.2d at 760, and the Act does not prevent the shipowner from seeking either contribution or indemnity from third persons other than from a covered plaintiff's employer. But the Act does mandate that the employer's exclusive liability will be compensation under the Act.

If there is a further adjustment to be made when the vessel's common law negligence is concurrent with the plaintiff's employer's negligence, the decision is for the Congress. Allowing an offset or credit raises questions best decided by a legislative body which can account for factors that we may not appropriately consider: what kind of employer negligence reduces the longshoreman's recovery: common law or maritime? [That is, should the standards of judging employer negligence be the same as those applicable to the

the award of plaintiff, the
The innocent victim of con-
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to achieve equity for other
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ral liability.

gment is AFFIRMED.

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eme Court of the United States CLERK

OCTOBER TERM, 1978

No. 78-795

LINEAS MARITIMAS ARGENTINAS,
Petitioner,

vs.

NATHANIEL SAMUELS,
Respondent.

N FOR A WRIT OF CERTIORARI TO THE
ED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENT'S BRIEF IN OPPOSITION

WALTER H. BECKHAM, JR., ESQUIRE and
JOEL D. EATON, ESQUIRE
25 West Flagler Street, Suite 1201
Miami, Florida 33130
Tel: (305) 358-2800
Counsel for Respondent

QUESTIONS PRI

For reasons which will appe
agree that the decision sought
the second and third questions pr
the shipowner. We will respond
tions nevertheless; and although
framed, we will set out the quest
shipowner for the convenience of

1. Whether 33 U.S.C. §905(
and Harbor Workers' Compe
ports to relieve the shipowne
ages for acts or omissions o
the finder of fact to evaluat
centage of fault of the conc
dore and reduce the plaintiff
against the shipowner accord

2. Whether under the 1972 A
§905(b) which abrogated a
action based upon the warra
iness, the shipowner is liabl
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tradiction of land-based negligence principles allowing the landowner to rely on the contractor's supervisory personnel to relay the warning or knowledge to the employees.

STATEMENT OF THE CASE

We take issue with the petitioning shipowner's statement of the case, and will supplement it briefly in order to provide a more accurate background to this Court. The plaintiff-respondent, a 44 year-old longshoreman and father of three, was hired at the local union hall in the early forenoon to unload steel from the Rio Atuel (T. 237, 241-242).[1] He worked all afternoon in the 'tween decks of the ship's number 3 hatch and broke for supper around 6:00 P.M. (T. 72, 242). When he returned to the ship at 7:00 P.M., darkness had fallen (T. 243, 234, 462). He and his gang then began working in the lower hold of the number 3 hatch, discharging 20′ and 40′ lengths of steel (T. 77, 254, 297, 345). The plaintiff had not been in the lower hold before darkness fell (T. 253).

Access to the lower hold was by way of a vertical ladder on each end of the number 3 hatch opening at the centerline of the ship (T. 298-99). The 40′ lengths of

d, he stepped onto steel, and
e of the ladder which he de-
le left in the stow behind the
feet to ten feet deep (T. 73).

r hold was indisputably the
3, 302-03, 350, 368-69, 396, 398).
own lighting system, the only
vere shining on the main deck
lights were not effective for
nough many ships have integral
r night discharging operations,
78, 79, 98-99, 329-30, 371, 430).
by the Rio Atuel the night
vas four portable drop lights
light was placed in each cor-
the main deck level (T. 244,
d not be lowered down to the
the nature of the discharging
he 40′ lengths of steel had to
ner fashion because they were
ng (T. 75-78, 325). Removing
vitably causes it to swing into
p light cords, breaking them
st place to put the drop lights

the ladder and not in the square formed by the hatch opening, it received no direct illumination from the drop lights (T. 352). The farther the longshoremen moved away from this directly illuminated square, up into the "wings" of the lower hold, the darker it got (T. 84, 326, 368). It was dark enough that when the ship's crew inspected the cargo before turning the hold over to the stevedore, they used flashlights (T. 243, 260, 461). The gang foreman complained to the ship's crew before the accident that "the lights was dim; they had pretty dim lights back there," but they did nothing about it (T. 83, 92). The drop lights were flickering and dimming on more than one occasion between the time work was begun in the lower hold and the plaintiff's accident (T. 81, 92).

The longshoremen had taken a water cooler into the lower hold with them; it was placed back in the wings, out of the way of the steel which was being discharged through the hatch opening (T. 73-74, 247, 347-48). That was the safest place to put it (T. 373, 406). The plaintiff had just finished tying on a load of steel and went into the wings, which is the safest place to be when the steel is brought up by the crane (T. 326, 373-74). When that particular load was being discharged, it knocked out one of the drop lights across the hatch from the void in the

265-66, 466). He stepped into the hole ten or twelve seconds after the drop light had been knocked out (T. 267-68). Immediately after the plaintiff fell into the hole, the gang foreman went to him (T. 82). The gang foreman described the lighting at that time this way: "It was good and dark back there. It wasn't black dark but it wasn't too much light" (T. 83). A fellow longshoreman said, "It was dark up under there" (T. 321, 304). The plaintiff simply described it as "dark" (T. 455); and, elsewhere, that "where the keg sat at, you can just barely see" (T. 270-71).

Although the ship's personnel had inspected the area with flashlights before turning the hold over to the stevedore, there is no evidence in the record that any warning of the dangerous hole was given to the stevedore or any of its employees. The gang foreman did testify that he knew of the presence of the hole, but it is undisputed that the plaintiff did not. The issue of the plaintiff's comparative negligence was submitted to the jury, which found him to be without fault. This finding conclusively establishes that the void was not "open and obvious" to the plaintiff; rather, it was a dangerous dark hole in a dark hold. The jury assessed the plaintiff's damages at $32,500. A lien of approximately $2,800 was imposed on the recovery in favor of the plaintiff's workmen's compensation

single issue presented in *Edmonds*. We
the circumstances are ordinary, however.
exception of *Edmonds*, the "equitable c
the shipping industry has been uniformly
various Courts of Appeals which have con
tion. *Samuels* v. *Empresa Lineas Marit*
573 F.2d 884 (5th Cir. 1978); *Shellman*
Lines, Inc., 528 F.2d 675 (9th Cir. 1975),
U.S. 936 (1976); *Dodge* v. *Mitsui Shinto*
Tokyo, 528 F.2d 669 (9th Cir. 1975), *cert.*
944 (1976). *See Zapico* v. *Bucyrus-Erie*
(2nd Cir. 1978) (characterizing *Edmonds*
579 F.2d at 726, n. 8); *Lopez* v. *A/S D/S*
F.2d 319 (2nd Cir. 1978); *Brown* v. *Ivat*
545 F.2d 854 (3rd Cir. 1976), *cert. denie*
(1977). This Court denied certiorari in ea
which were presented for review. We
tiorari was granted in *Edmonds* for the
correcting its facially erroneous misread
language of 33 U.S.C. §905(b).

The *Edmonds* decision is predicated
and easily demonstrated misunderstandin
of the first two sentences of §905(b).
read in pertinent part as follows:

ich action shall be permitted if the injury was
d by the negligence of persons engaged in pro-
g stevedoring services to the vessel.

onds court badly misread the second sentence
its adoption of the shipping industry's "equitable
lely on this insupportable misreading:

ıd in absolute terms, the first sentence and the
d sentence are in conflict in every case in which
is found on the part of both the ship and the
dore. The first sentence says that if the injury
ısed by the negligence of a vessel the longshore-
may recover, but the second sentence says he
not recover anything of the ship if his injury
caused by the negligence of a person providing
doring services. The sentences are irreconcilable
ıd to mean that any negligence on the part of
ıip will warrant recovery while any negligence
e part of the stevedore will defeat it. They may
rmonized only if read in apportioned terms. The
ıt meaning and intention of the Congress was to
de for liability of the ship to the extent its fault
buted to the injury, while insulating it against
ty to the extent that the stevedore's fault con-
ed to the injury. So read, the sentences are

are dealt with in detail in the previously cited decisions which have rejected the proposal, and we will not belabor them here.

In sum, we think it is apparent that certiorari was granted in *Edmonds* for the sole purpose of correcting it, since its bases are so clearly erroneous. We do not perceive that any serious arguments can be advanced for affirmance of *Edmonds*. Under those circumstances, it is respectfully submitted that it is neither necessary nor desirable to grant certiorari in this case, notwithstanding that certiorari was granted in *Edmonds*. In the event that certiorari is granted in this case on the "equitable credit" issue, we would respectfully request an opportunity to file a brief on the merits in order to protect our position, rather than be relegated to summary disposition upon determination of *Edmonds*—because we perceive that the *Edmonds* court was not presented with several important arguments which should be thoroughly presented to this Court before any determination of the question is reached.

2. The "open and obvious" danger doctrine is not presented in this case, there is no significant conflict of decisions, and certiorari should not be granted on this question.

Imm. & Nat. Serv., 385 U.S. 630 (
asking this Court to again revie
evidence—which this Court has c

> to review individualized p
> which the sole issue is suf
> seems . . . not only to disr
> function, but to deflect the
> mass of important and difficu

Sentilles v. *Inter-Caribbean Corp.*,
(Stewart, J., concurring).

In the second place, *Cox* d
obvious" danger. The shipowner'
is similar to *Cox* is predicated u
terization of the dark hole into w
an "open and obvious" hazard.
however, was not charged on "op
It was instructed only that the s
exercise reasonable care to have
safe condition for use by the ste
stevedore warning of any conceal
T. 547). In addition, the jury f
without comparative fault, conclu
tion that the dark hole presente

with respect to liability for open and obvious dangers,[2] and the issue is not raised on appeal.

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2. The vessel owner may incur liability even when the danger is open and obvious if the employee was not in a position fully to appreciate the risk or to avoid the danger even though aware of it. *Gay, supra,* 546 F.2d at 1241.

573 F.2d at 886.[6] Even if this question had been raised below, this Court has recently indicated that it will not grant certiorari to decide a question not passed upon in the decision of the Court of Appeals. *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 163-64 (1975). In short, no question of an "open and obvious" danger is presented by this case in its present posture; there is no conceivable conflict with *Cox* as a result; and there is no need for this Court to grant certiorari on this issue to simply rubber-stamp an already uniform standard of care.

Even if this case arguably presented a question as to liability for an "open and obvious" danger, there is no significant conflict with *Cox*. Notwithstanding the ship-owner's suggestion that *Cox* holds there is no liability for "open and obvious" dangers created by the ship and known

ged by cargo being hoisted out
en suggested as the only possi-
of the accident was an operation
of the stevedore.

ident was caused solely by the
can be no liability on the part
t reasonably be asserted in the
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in view of the dark hole and
ng supplied by the ship, the
danger or warn of its presence,
knowledge of the unseen hole

arguably absolves a shipowner
open and obvious" danger cre-
uit has both ignored and effec-
of *Cox*. *Napoli* v. [*Transpacific
Cargo Carriers, Inc.*] *Hellenic*
2nd Cir. 1976); *Lopez* v. *A/S*
319 (2nd Cir. 1978); *Canizzo*
.2d 682 (2nd Cir. 1978), *cert.*
No. 78-358; October 30, 1978);
ds Steamship Co., 572 F.2d 364

certiorari in either *Cox* or *Canizzo*, it is inappropriate to grant certiorari on this issue in this case.

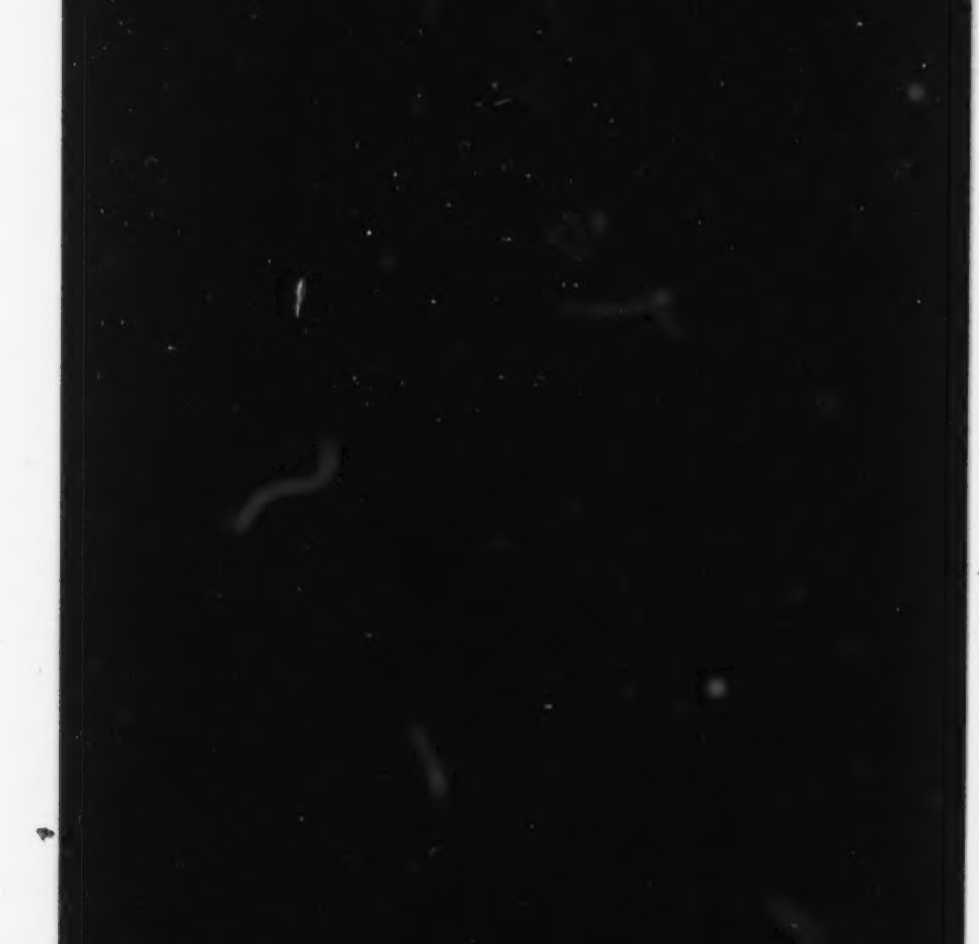
Finally, we would note that the shipowner's reliance upon the "open and obvious" danger doctrine as an absolute bar to liability, even if it were presented in this case, is reliance upon a soundly discredited artifact. Modern notions of landowner/shipowner responsibility recognize that the obviousness of a danger is not dispositive of the question of reasonable care. The "open and obvious" danger doctrine says, in effect, that a plaintiff is absolutely barred where he is injured in an encounter with a hazard which was so obviously dangerous that the plaintiff *must* have known of and appreciated the risk, but voluntarily encountered it nonetheless. That is a classic statement of the disfavored defense of assumption of the risk. The "open and obvious" danger doctrine is clearly an assumption of the risk defense in a "no-duty" disguise.

The assumption of the risk defense has been almost universally merged into the doctrine of comparative negligence in recent years, in both the landowner/shipowner liability and products liability context. *See, e.g., Blackburn* v. *Dorta*, 348 So.2d 287 (Fla. 1977). Numerous courts have recognized in both contexts that the "open and obvious"

467 P.2d 229 (1970); *Rourke* v. *Garza*, 530 S.W.2d 794 (Tex. 1975); *Beloit Corp.* v. *Harrell*, 339 So.2d 992 (Ala. 1976); *Olson* v. *Chesterton Co.*, 256 N.W.2d 530 (N.D. 1977); *Brown* v. *North American Mfg. Co.*, 576 P.2d 711 (Mont. 1978). Congress has expressly prohibited an assumption of the risk defense in §905(b) actions, and the Courts of Appeals have almost universally adopted Restatement (2nd) of Torts, §343A to provide a vehicle for the merger of assumption of the risk into comparative negligence in actions against shipowners. *See Napoli, supra; Gay, supra.*

We do not think the question of "open and obvious" dangers is even presented ir this case, nor do we think there is any significant conflict with *Cox*. Even if the question were presented here, and conflict sufficient to invoke this Court's jurisdiction existed, we do not perceive that this Court is prepared to undo universal developments in modern tort law, and reerect an assumption of the risk defense as an absolute bar in §905(b) actions, where Congress has prohibited the defense—especially in a case where the jury found the plaintiff to be without comparative fault. For these reasons, it is respectfully submitted that certiorari should not be granted on this issue.

3. Neither the decision below nor the record



Moreover, the contention urged he
aground on the express intention of Co

> Permitting actions against the vesse
> gence will meet the objective of e
> because the vessel will still be req
> the same care as a land-based perso
> safe place to work. Thus, nothing
> tended to derogate from the vessel's
> take appropriate corrective action w
> should have known about a dangerou
>
> So, for example, where a longshorem
> spill on a vessel's deck and is injur
> amendments to Section 5 would still
> against the vessel for negligence. To
> establish that: (1) the vessel put
> stance on the deck, or knew that i
> willfully or negligently failed to rem
> foreign substance had been on the
> period of time that it should have bee
> removed by the vessel in the exerc
> care by the vessel under the circum

H.R. Rep. No. 92-1441, U.S. Code Con
92nd Cong., 2d Sess. 4698, 4704 (1972).[7]

The trial court instructed t

> "The owner of a ship u
> ent stevedoring company
> duty to the stevedoring co
> men employees to exercise
> a ship in a reasonably sa
> the stevedore and to give t
> any concealed or latent de
> the shipowner and not by
> ployees or discoverable b
> exercise of ordinary care."

The shipowner had requeste
instruction on open and obvious
of the view that the instruction
ject matter of the open and obv
the shipowner's requested cha
495). Thus the jury was instruc
of the shipowner to warn of con
The converse is seemingly indi
be no duty to warn if the defect
open and obvious. Thus open an
in the case, the jury was instru
the issue was argued in closing

It is incorrect to state that the

that the time has come for definitive Supreme Court consideration of what is now a morass of conflicting lower court concepts of shipowner/longshoreman negligence standards, a situation lacking uniformity which permits the irreconcilable decisions of *Samuels* and *Cox* to arise in different Circuits.

With regard to the third Question Presented by the Petitioner, whether a warning to a supervisor employee or knowledge of the supervisor employee is sufficient to constitute warning to the individual employee, respondent contends that the issue was not raised below.

One need only read the appellate opinion to understand that the issue of knowledge/warning of the individual longshoreman was of significance to the Fifth Circuit. The Court stated "There was evidence that the stevedore foreman and one or more of the other longshoremen knew of the hole; but there was evidence that the plaintiff himself did not know of it, and it had never been called to *his* attention." (App. 4a) (emphasis added). Notice to the supervisory employees was uncontradicted in the evidence.

Respondent looks to the briefs in the Fifth Circuit and says that no issue was asserted. Not mentioned is